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No. 95-325

(6)

IN THE
Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA,
Petitioner,
v.

REORGANIZED CF&I FABRICATORS OF UTAH, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Tenth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE AND* BRIEF FOR THE UNITED STEELWORKERS OF AMERICA, AFL-CIO, AS *AMICUS CURIAE* SUPPORTING RESPONDENTS

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MOTION BY THE UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC, FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* SUPPORTING RESPONDENTS

The United Steelworkers of America, AFL-CIO-CLC ("USWA"), hereby moves for leave to file the accompanying brief *amicus curiae* in support of the position of the respondents in the instant case.

The USWA is an international labor organization with over 650,000 members who are employed in steel and other industries. For decades, the USWA served as the collective bargaining representative of the vast majority of the employees of the steel subsidiary of CF&I Corporation ("CF&I") at the company's steel plant and rail mill in Pueblo, Colorado. In that capacity, the USWA negotiated with CF&I over many years to establish and maintain comprehensive pension and health insurance programs enabling CF&I employees to earn vital retirement benefits.

In 1990, CF&I and its subsidiaries sought relief under chapter 11 of the Bankruptcy Code. The USWA played a significant role in the bankruptcy reorganization case. The USWA's efforts were aimed at preserving jobs and the employment-related benefits of employees and retirees. The USWA acted as the exclusive collective bargaining representative of most CF&I employees, served on the officialy committee of unsecured creditors appointed pursuant to 11 U.S.C. Section 1102(a)(1), and negotiated a new collective bargaining agreement with the purchaser of most of CF&I assets, an agreement which served as an important foundation for the CF&I reorganization. Finally, the USWA served as the "authorized representative" of CF&I's retirees and their surviving spouses in negotiations over their right to life-time retiree medical benefits. *See* 11 U.S.C. Section 1114(b)(1).

Beyond the CF&I bankruptcy, the restructuring of the steel industry since the mid-1980's has required the USWA to represent the interests of tens of thousands of employees and retirees facing loss of their livelihood and

employment-based benefits in similar reorganization proceedings. The USWA played a major and unique role in the chapter 11 cases of such companies as LTV, Wheeling-Pittsburgh Steel, Sharon Steel, Kaiser Steel and Copperweld Steel.

As the "authorized representative" of most CF&I retirees and their surviving spouses pursuant to Section 1114, the USWA negotiated as part of a plan of reorganization the creation and funding of a Voluntary Employee Benefit Association ("VEBA") pursuant to Section 501(c)(9) of the Internal Revenue Code ("IRC"), which settled unsecured claims for future benefits for retirees. The VEBA provides ongoing medical benefits for retirees and their dependents. The purchaser was unwilling to assume responsibility for these benefits other than through an allocation of part of the purchase price to the VEBA. While retiree benefits were reduced, the VEBA permitted continuation of vital health coverage for CF&I retirees and their dependents.

With the cooperation and active participation of the USWA, the CF&I bankruptcy was successful in reorganizing a steel busines for the benefit of employees, retirees, creditors, customers, and the economically depressed community of Pueblo, Colorado. The reorganization was achieved notwithstanding, among other obstacles, adverse industry conditions, CF&I's limited ability to continue operating in the absence of an investor or purchaser, a dearth of potential investors or purchasers, the requirement to achieve some recovery for unsecured creditors, and the human needs of employees to retain their jobs and of retirees to continue a basic lifeline to medical benefits. CF&I's reorganization was a success that exemplified the "fundamental purpose of reorganization," which is to "prevent a debtor from going into liquidation, with an attendant loss of jobs and possible misuse of economic resources." *NLRB* v. *Bildisco & Bildisco*, 465 U.S. 513, 528 (1984).

CF&I's reorganization was possible only because the bankruptcy court rejected penalty claims filed by the Internal Revenue Service ("IRS"). *See In re CF&I Fabricators, Inc.*, 148 B.R. 332 (Bankr. D. Utah 1992) (pet. 38a-62a). The bankruptcy court found that the IRS's 10 percent "first tier" nonpecuniary loss penalty claim under 26 U.S.C. § 4971(a) (imposed for CF&I's failure to make contributions to its pension plan), and the IRS's 100 percent "second tier nonpecuniary loss penalty claim under 26 U.S.C. § 4971(b) (imposed on a cumulative basis for CF&I's continuing failure to correct the delinquency), were not entitled to excise tax priority under the Bankruptcy Code, 11 U.S.C. § 507 (a)(7)(E). *Id.* at 337-40, pet. 46a-52a. The bankruptcy court found that assigning such a priority would have doomed any chance for reorganization, resulting in a total loss to all other interested parties. *Id.* at 339, pet. 51a. In subsequent appeals the IRS, presumably for tactical reasons, abandoned its second tier penalty claims.

The IRS's assertion of priority for its claims is of grave concern to the USWA as a chapter 11 creditor, collective bargaining representative, and authorized representative of retirees. Because of the Bankruptcy Code's overall emphasis on "equality of distribution" to creditors, *Begier* v. *IRS*, 496 U.S. 53, 58 (1990), priorities are interpreted strictly, *United States* v. *Embassy Restaurant, Inc.*, 359 U.S. 29, 31 (1959). Assigning excise tax priority to the 10 percent nonpecuniary loss penalty at issue in this case and, by necessary logic, to the similar 100 percent nonpecuniary loss penalty, would undermine this Court's long-standing decisions that Bankruptcy Code provisions must be interpreted consistent with the overall structure and goals of the Bankruptcy Code, and specifically so when interpreting bankruptcy provisions involving taxes. *City of New York* v. *Feiring*, 313 U.S. 283, 285 (1941). Because this Court has held that many of the rights of workers and retirees under a collective bargaining agreement, and as creditors in a chapter 11 proceeding, are ultimately dependent on the provisions of the Bankruptcy Code, *Embassy Restaurant*, 359 U.S. 31;

Bildisco, 465 U.S. 513, labor unions have a strong interest in consistent interpretation of the Bankruptcy Code.

In almost all chapter 11 bankruptcies, including the CF&I case, the estate has insufficient assets to pay creditors in full—or even a significant portion of their claims. Indeed, many chapter 11 bankruptcies ultimately result in liquidation because there are insufficient assets for a debtor to reorganize and remain an operating concern. Assigning the IRS an excise tax priority would elevate the IRS's nonpecuniary penalty loss claims at the expense of almost all other constituencies and ultimately the reorganization process itself, a result at odds with Congress's purpose in enacting the Bankruptcy Code.

The PBGC, appearing as *amicus curiae* in support of the IRS, does not discuss the impact of this case on reorganizations. The PBGC does state that it has little concern about how "its recovery in this case" will be affected by assigning priority to the IRS's claims because the PBGC's "financial health will not be greatly affected" by the amount of the recovery. The PBGC also posits that the courts below inappropriately concluded that granting the IRS a tax priority would negatively affect CF&I retirees in their capacity as pension plan participants. PBGC Br. at 22-23.

The USWA does not have the luxury of the PBGC's perspective, and it respectfully disagrees with the PBGC's notions concerning the interest of retirees. The USWA was concerned about a successful reorganization and the creation of a viable VEBA because the physical health of CF&I retirees, and the economic survival of employees, was at stake. The outcome of this case will have a major impact on the health of retirees, the economic survival of employees, and the success of reorganizations in many other chapter 11 bankruptcies. The USWA, and not the parties or PBGC as *amicus curiae*, can present these perspectives, facts, and legal implications. Thus, the USWA has an interest as *amicus curiae* in support of the respondents on the question of the priority of the IRS's nonpecuniary loss penalty claims.

CONCLUSION

For the above stated reasons, this motion for leave to file a brief *amicus curiae* should be granted.*

Respectfully submitted,

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* Counsel for USWA has received consent of the respondents to file the accompanying Brief *amicus curiae*. Counsel for the USWA has not had opportunity to contact counsel for the United States.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES Page

TABLE OF AUTHORITIES—Continued

Page

STATUTES

Internal Revenue Code

TABLE OF AUTHORITIES—Continued

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BRIEF FOR THE UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC, AS *AMICUS CURIAE* SUPPORTING RESPONDENTS

INTEREST OF THE *AMICUS CURIAE*

The brief of *amicus curiae* is filed contingent on the granting of the foregoing motion for leave to file said brief. The interest of the USWA is set forth in that motion.

SUMMARY OF ARGUMENT

The issue in this case is whether IRS claims against employers who fail to make required contributions to their pension plans are treated as taxes or penalties for purposes of priority treatment under the Bankruptcy Code. This Court held that under the Bankruptcy Act, the predecessor to the Bankruptcy Code, the status of a federal or state assessment as a task or penalty was determined by the nature of the assessment. There was no definition of "tax" in the Act, as there is no definition of "tax" in the Bankruptcy Code. Congress did not in-

tend to change the established judicial tax/penalty analysis when it enacted the Bankruptcy Code.

There is no dispute that IRS's first tier penalty is a penalty, not an excise tax, under this Court's decisions construing the Bankruptcy Act and lower court decisions interpreting the Bankruptcy Code. *CF&I*, 148 B.R. at 338, pet. 47a. Congress created claims under Section 4971 of the IRC in order to penalize employers who fail to make required pension contributions. All sums collected by the IRS pursuant to its penalty go directly to the general treasury of the United States; no part of the recovery is utilized to fund pension benefits or compensate the PBGC for a monetary loss.

There is also no dispute that, if the Bankruptcy Code's excise tax priority is applicable to the 10 percent penalty (which in this case amounts to approximately \$1.2 million), it would be equally applicable to the cumulative 10 and 100 percent penalties, totalling approximately \$41.8 million, which the IRS chose not to pursue on appeal. *Id.* at 337, pet. 44a-45a. Despite the IRS's abandonment of its second tier penalty claim in this proceeding, this Court's decision will clearly influence the treatment of such second tier penalty claims, and reorganization efforts, in future cases.

Application of the tax/penalty analysis to the IRS's penalty claims is also consistent with the overriding congressional intent of promoting reorganization of companies, with the attendant saving of jobs and employee benefits, through chapter 11 of the Bankruptcy Code.

While the IRS's request for bankruptcy priority treatment of its claim is based on descriptive labels in the IRC, the courts below correctly held that the established judicial tax/penalty principles are applicable and the IRS acknowledged that its claims are not taxes under that analysis. The decision of the court below should be affirmed.[1]

[1] The USWA takes no position on the bankruptcy court's equitable subordination of the IRS's claims.

ARGUMENT

I. THE IRS IS NOT ENTITLED TO PRIORITY TREATMENT FOR ITS CLAIM PURSUANT TO SECTION 4971 OF THE IRC BECAUSE SECTION 4971 IMPOSES A PENALTY, NOT AN "EXCISE TAX," WITHIN THE MEANING OF SECTION 507(a)(7)(E) OF THE BANKRUPTCY CODE.

A. In Applying Bankruptcy Priorities, This Court Has Consistently Distinguished Between "Taxes" and "Penalties" Based on the Purpose and Nature of the Claim.

In interpreting provisions of the Bankruptcy Code, this Court begins with the statutory language. *Pennsylvania Dep't of Pub. Welfare* v. *Davenport*, 495 U.S. 552, 557-58 (1990); *Kelly* v. *Robnison*, 479 U.S. 36, 43 (1986). Section 507(a) of the Bankruptcy Code provides priority treatment for certain "excise taxes," as follows:

> (a) The following expenses and claims have priority in the following order:
>
> * * *
>
> (7) Seventh, allowed unsecured claims of governmental units, only to the extent that such claims are for—
>
> * * *
>
> (E) *an excise tax on*—
>
> (i) a transaction occurring before the date of the filing of the petition for which a return, if required, is last due, under applicable law or under any extension, after three years before the date of the filing of the petition; or
>
> (ii) if a return is not required, a transaction occurring during the three years immediately preceding the date of the filing of the petition.

11 U.S.C. § 507(a) (West 1993) (emphasis added).

Congress did not define the terms "tax" and "excise tax" in the Bankruptcy Code or by reference to a definition in another statute, nor did it do so in the predecessor Bankruptcy Act. To advance well-defined policies underlying federal bankruptcy law, this Court consistently applied a functional definition of "taxes" entitled to priority treatment in Section 64 of the Bankruptcy Act. Pursuant to this definition, "taxes" are limited to "those pecuniary burdens laid upon individuals or their property, regardless of their consent, for the purpose of defraying the expenses of government or of undertakings authorized by it." *Feiring*, 313 U.S. at 285; *New Jersey* v. *Anderson*, 203 U.S. 483, 492 (1906); *United States* v. *New York*, 315 U.S. 510, 515-16 (1942).

In applying this definition, this Court concluded that an assessment that serves to promote other purposes, such as to penalize undesirable conduct, would not be a "tax" for purposes of bankruptcy legislation even when the assessment was labeled a tax in the relevant nonbankruptcy statute. *Feiring*, 313 U.S. at 285 (status of claim as a "tax" within the meaning of Section 64 of the Bankruptcy Act does not depend on whether the obligation has been denominated a "tax" in a nonbankruptcy statute but, rather, on "whether its incidents are such as to constitute a tax within the meaning of § 64"); *New Jersey*, 203 U.S. at 491 (whether claim is a tax within the meaning of Section 64 of the Bankruptcy Act is a question for the federal courts).

This Court applied the tax/penalty functional analysis where, as here, an assessment was denominated an "excise tax" in a federal statute. *United States* v. *New York*, 315 U.S. at 515-16 (pecuniary burden imposed by Congress that satisfies functional definition constitutes a tax "by whatever name it may be called"); [2] *cf. Simonson* v. *Granquist*, 369 U.S. 38, 42 (1962) ("the character of a [federal tax] penalty is by no means changed by calling it a lien"); *United States* v. *Sotelo*, 436 U.S. 268, 275 (1978) ("That the funds due are referred to as a 'penalty' when the Government later seeks to recover them does not alter their essential character as taxes for the purposes of the Bankruptcy Act").

[2] The Brief of the United States does not analyze or mention this Court's decision in *United States* v. *New York*.

This Court's approach in defining "taxes" and "penalties" on the basis of the purpose and nature of the exaction involved derives from fundamental bankruptcy purposes and principles, *see, e.g., Feiring*, 313 U.S. at 285, particularly the two core principles that (i) priorities are to be narrowly construed, *Embassy Restaurant*, 359 U.S. at 31 ("if one claimant is to be preferred over others, the purpose should be clear from the statute") (quoting *Nathanson* v. *NLRB*, 344 U.S. 25, 29 (1952)); *In re Amarex, Inc.*, 853 F.2d 1526, 1530 (10th Cir. 1988); *Trustees of the Amalgamated Ins. Fund* v. *McFarlin's Inc.*, 789 F.2d 98, 100 (2d Cir. 1986); and (ii) penalties are disfavored to avoid harming innocent creditors. As explained by this Court in *Simonson* v. *Granquist*, the prohibition on recovery for penalties

> is in keeping with the broad aim of the Act to provide for the conservation of the estates of insolvents to the end that there may be as equitable a distribution of assets as is consistent with the type of claim involved. . . . Enforcement of penalties against the estates of bankrupts . . . would serve not to punish the delinquent taxpayers, but rather their entirely innocent creditors.

369 U.S. at 40-41. This approach mandates affirmance of the decisions below.

B. The IRS's Claims Under Section 4971 of the IRC Are Penalties, Not "Taxes," Within the Meaning of Section 507(a)(7)(E) of the Bankruptcy Code.

1. The IRS's claims are "penalties" and not "taxes" under this Court's settled tax/penalty analysis for review-

ing bankruptcy priorities. The legislative history demonstrates that Congress intended Section 4971 to serve as a penalty and not to defray the expenses of government. *See* H.R. Rep. No. 807, 93rd Cong., 2d Sess., reprinted in 1974 U.S.C.C.A.N. 4670, 4694 ("the committee bill places the . . . *penalty* for underfunding on the person on whom it belongs—namely the employer") (emphasis added); S. Rep. No. 383, 93rd Cong., 2d Sess., reprinted in 1974 U.S.C.C.A.N. 4890, 4909 (same).

Two circuit courts of appeals, applying these principles, held that similar claims based on the assessment contained in Section 4941 of the IRC, which is labeled a "tax" and contained within the IRC subtitle entitled "miscellaneous excise taxes," imposed a penalty and were not entitled to priority "tax" treatment under the Bankruptcy Act. *See In re Unified Control Sys., Inc.*, 586 F.2d 1036, 1037-38 (5th Cir. 1978) (per curiam); *In re Joel Kline*, 547 F.2d 823 (4th Cir. 1977) (per curiam), *aff'g*, 403 F. Supp. 974 (D. Md. 1975).

In interpreting provisions of the Bankruptcy Code, this Court has instructed that established judicial interpretations of the Bankruptcy Act continue to apply absent clear indication that Congress intended a change when it enacted the Bankruptcy Code. *Midlantic Nat'l Bank* v. *New Jersey Dep't of Envtl. Protection*, 474 U.S. 494, 501 (1986) ("The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific. . . . The Court has followed this rule with particular care in construing the scope of bankruptcy codifications") (citation omitted); *Kelly*, 479 U.S. at 47, 53; *Dewsnup* v. *Timm*, 502 U.S. 410, 418-20 (1992).

As demonstrated above, Congress did not write "on a clean slate," *id.* at 417, when it established priorities for "taxes" in the Bankruptcy Code. Indeed, there is no evidence in the legislative history of the Bankruptcy Code

that Congress intended to discard the established judicial definition of "taxes" eligible for priority treatment under federal bankruptcy laws. Thus, courts have continued to apply the principles set forth in *United States* v. *New York*, *Feiring*, and *New Jersey* to distinguish taxes from penalties under the Bankruptcy Code. *See, e.g.*, *In re Cassidy*, 983 F.2d 161 (10th Cir. 1992) (claim arising from exaction under Section 72(t) of the IRC for premature withdrawal of pension funds constitutes a penalty for nonpecuniary loss not entitled to tax priority under Section 507(a)(7) of the Bankruptcy Code); *In re C-T, Inc.*, 977 F.2d 137 (4th Cir. 1992) (claim arising from retirement plan taxes pursuant to Section 4980 of the IRC found to have substantially more attributes of an excise tax than a penalty, and entitled to priority treatment), *cert. denied*, 507 U.S. 1004 (1993).

Moreover, all but one court that has considered the issue has held that the IRS's assessments pursuant to Section 4971 impose a penalty on employers who underfund their pension plans and, therefore, are not claims for "taxes" or "excise taxes" within the meaning of Section 507(a)(7)(E) of the Bankruptcy Code. *See In re CF&I Fabricators, Inc.*, 148 B.R. 332, pet. 38a-62a (Bankr. D. Utah 1992), *aff'd in unpublished opinion, see* Pet. 10a-11a, *aff'd.* 53 F.3d 1155, pet. 1a-9a (10th Cir. 1995); *In re Chateaugay Corp.*, 15 Empl. Ben. Cas. (BNA) 1237 (Bankr. S.D.N.Y.), *rev'd on other grounds*, 146 B.R. 626 (S.D.N.Y. 1992), *vacated on onsent of the parties*, 157 B.R. 74 (S.D.N.Y. 1993); *In re Airlift Int'l, Inc.*, 120 B.R. 597, 601 (S.D. Fla. 1990); *In re Wheeling-Pittsburgh Steel Corp.*, 103 B.R. 672, 693 (Bankr. W.D. Pa. 1989); *In re Bertsch & Co.*, No. IP84-8366RA J, 1988 Bankr. LEXIS 2570 (Bankr. S.D. Ind. Aug. 15, 1988). *But see In re Mansfield Tire & Rubber Co.*, 942 F.2d 1055 (6th Cir. 1991), *rev'g*, 120 B.R. 862 (N.D. Ohio 1990), *aff'g*, 80 B.R. 395 (Bankr. N.D. Ohio 1987), *cert. denied*, 502 U.S. 1092 (1992).

2. The IRS contends that what it deems a "plain text" reading of Section 507(a)(7)(E) establishes that Congress intended a change in the definition of tax claims when it enacted the Bankruptcy Code. The IRS argues that an assessment labeled an "excise tax" by Congress in any federal statute must necessarily constitute an "excise tax" for purposes of Section 507(a)(7)(E) of the Bankruptcy Code.

The IRS's "plain text" argument is not a plain meaning argument, and should be deemed a "consistent meaning" argument. This argument is without support in this Court's decisions, which have repeatedly held that identical terms may have different meanings in different federal statutes. As emphasized in *Atlantic Cleaners & Dyers, Inc.* v. *United States*, 286 U.S. 427, 433 (1932):

> Most words have different shades of meaning, and consequently may be variously construed, not only when they appear in different statutes, but when used more than once in the same statute or even in the same section. . . . It is not unusual for the same word to be used with different meanings in the same act, and there is no rule of statutory construction which precludes the courts from giving to the word the meaning to which the Legislature intended it should have in each instance.

See also Director, OWCP v. *Perini N. River Assocs.*, 459 U.S. 297, 320 n.29 (1983) (the term "maritime" has different meanings in 28 U.S.C. § 1331(1) and in § 2(3) of the Longshoremen's and Harbor Workers' Compensation Act); *District of Columbia* v. *Carter*, 409 U.S. 418, 420 (1973) ("Whether the District of Columbia constitutes a State or Territory within the meaning of any particular statutory or constitutional provision depends upon the character and aim of the specific provision involved"); *Puerto Rico* v. *Shell Co.*, 302 U.S. 253, 258-59 (1937) ("although Puerto Rico is not a territory within the reach of the Sixth and Seventh Amendments and may not be a 'territory' within the meaning of the word as used in some

statutes . . . there is no reason why Puerto Rico should not be held to be a 'territory' within the meaning of section 3 of the Sherman Act"); Cook, *"Substance" and "Procedure" in the Conflict of Laws*, 42 Yale L.J. 333, 337 (1933) ("The tendency to assume that a word which appears in two or more legal rules, and so in connection with more than one purpose, has and should have precisely the same scope in all of them, runs all through legal discussions. It has all the tenacity of original sin and must constantly be guarded against.").[3]

Moreover, the IRS's argument for cross-statutory consistent meaning puts words in the mouth of Congress that do not appear in the Bankruptcy Code. Congress said that a seventh priority would be afforded for "excise taxes," not "for excise taxes as denominated in the IRC." In many other provisions of the Bankruptcy Code, Congress did define terms by reference to specific provisions of other statutes. For example, within Section 507, the same priority section at issue here, Congress provided a first priority for "fees and charges assessed against the estate under chapter 123 of title 28." 11 U.S.C. § 507 (a)(1). Indeed, other provisions of the Bankruptcy Code define terms contained therein by specific reference to terms and provisions contained in the IRC. *See, e.g.*, 11 U.S.C. § 101(41)(C)(i) (West Supp. 1995) ("employee pension benefit plan that is a governmental plan, as defined in section 414(d) of the Internal Revenue Code of 1986"); 11 U.S.C. § 101(41)(C)(ii) (West Supp.

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[3] Indeed, the definiiton of a term in the Bankruptcy Code, or any other individual statute, is not necessarily internally consistent. *See, e.g., Dewsnup*, 502 U.S. at 417 n.3 (particularly in light of the pre-Code rule, the words "allowed secured claim" have a different meaning in two subsections of the same section of the Bankruptcy Code); *see also Concrete Pipe and Prods., Inc.* v. *Construction Laborers Pension Trust*, 113 S. Ct. 2264, 2285 (1993) (term "unreasonable" given different meaning in different sections of Multiemployer Pension Plan Amendments Act); *Helvering* v. *Stockholms Enskilda Bank*, 293 U.S. 84, 86-87 (1934) (term "obligations" has different meaning in different parts of federal tax law).

1995) ("eligible defined compensation plan, as defined in section 457(b) of the Internal Revenue Code of 1986"); *see also* 11 U.S.C. § 346(g)(1)(c) (West Supp. 1995) (reference to transfers resulting in gain or loss under IRC section 371); 11 U.S.C. § 522(d)(10)(E)(iii) (West Supp. 1995) (reference to non-qualifying payments under IRC sections 401(a), 403(a), 403(b), or 408); 11 U.S.C. § 724(d) (West Supp. 1995) (reference to tax liens under IRC section 6323).

Congress's failure to refer to the IRC to define the term "tax" or "excise tax" in Section 507 demonstrates that Congress intended courts to look beyond the labels of the IRC and to continue this Court's settled interpretation of the term "taxes" under the Bankruptcy Act. *BFP* v. *Resolution Trust Corp.*, 114 S. Ct. 1757, 1761 (1994) ("[I]t is generally presumed that Congress acts intentionally and purposely when it included particular language in one section of a statute but omits it in another") (quoting *Chicago* v. *Environmental Defense Fund*, 114 S. Ct. 1588, 1593 (1994)).

Finally, the IRS does not advocate a consistent approach. The IRS asserts, without authority, that bankruptcy courts may not look beyond the labels on assessments enacted by Congress but may do so for state-enacted assessments. IRS Br. at 20 n.11. A federal entity asserting a claim based on a penalty designated an "excise tax" by Congress would receive a priority claim, while a state entity asserting a claim based upon a similar penalty designated an "excise tax" by a state legislature would receive only a general unsecured claim. There is simply no textual or principled policy basis for such a result. *Cf. Patterson* v. *Shumate*, 504 U.S. 753, 758-59 (1992) (Congress's use of term "applicable nonbankruptcy law" not limited to state law). Nothing in the Bankruptcy Code, or specifically Section 507, suggests any grounds to distinguish between the federal and state governments in their capacities as claimants seeking priority treatment of claims as "taxes" under Section 507(a)(7)(E). *CF&I*, 148 B.R. at 339, pet. 51a. Indeed, given the absence of statutory language or evidence of a legislative purpose to distinguish between the federal and state governments as creditors, the IRS's proposed construction would violate the principle of equality of treatment of similarly-situated creditors. *See, e.g., Begier* v. *IRS*, 496 U.S. 53, 58 (1990); *United States* v. *Embassy Restaurant, Inc.*, 359 U.S. 29, 31 (1959); *Nathanson* v. *NLRB*, 344 U.S. 25, 29 (1952).

3. As labor organizations well know, this Court has held that the established definition of a term in federal labor laws may not be applicable in a bankruptcy context if that definition is inconsistent with the bankruptcy statute. *Embassy Restaurant*, 359 U.S. 29; *Joint Industry Bd. of the Elec. Indus.* v. *United States*, 391 U.S. 224 (1968). *Cf. Morrison-Knudsen Constr. Co.* v. *Director, OWCP*, 461 U.S. 624 (1983) (employer contributions to union trust funds are not "wages" for purposes of Section 2(13) of the Longshoremen's and Harbor Workers Compensation Act); *Alabama Power Co.* v. *Davis*, 431 U.S. 581, 592 n.16 (1977) ("Even if pensions are 'wages' for the purposes of the [National Labor Relations Act], their classification would not control their treatment under the [Military Service Act of 1967]").

In *Embassy Restaurant*, a union welfare fund asserted that its claim for unpaid contributions by the debtor/employer, owed to the fund for each full-time employee pursuant to a collective bargaining agreement, was entitled to the priority status afforded claims for "wages . . . due to workmen" under Section 64(a)(2) of the Bankruptcy Act. 359 U.S. at 29-30. The Fund relied on the established construction of the term "wages" under the National Labor Relations Act and the Social Security Act to include welfare fund contributions in attempting to fit its claim within a category warranting priority treatment. *Id.* at 33-34.

Rather than adopt the definitions of other federal statutes, the Court found this evidence inapposite, stating, "*We construe the priority section of the Bankruptcy Act, not those statutes.*" *Id.* at 33 (emphasis added). To do so, it was necessary to "examine the nature of these contributions." *Id.* at 32. The Court found that the contributions owed were not "due to workmen" and lacked "the customary attributes of wages." *Id.* at 33. Moreover, because the contributions were paid to the Fund, and not to the workers, affording the claim priority status would not have advanced Congress's purpose in establishing the priority to provide workers a "protective cushion" against the economic displacement caused by the employer's bankruptcy. *Id.* Finally, the Court noted that if the Fund's claims were treated on a par with wages, workers' recoveries might be diminished, thus frustrating Congress's purpose. *Id.* at 33-34.

Nine years later, in *Joint Industry Board,* the Court adhered to its holding and approach in *Embassy Restaurant. Joint Industry Board* involved unpaid employer contributions to an employees' annuity plan established under a collective bargaining agreement. 391 U.S. at 225. Although the annuities were

> (1) . . . to be paid as part of the wage bargain between employer and employee; (2) . . . the sum due each employee was specifically related to and measured by his work; (3) . . . the sum which each employee earned was accounted for separately and individually; he was entitled to the amount paid to the trustee on account of his individual labor; and (4) . . . inevitably, as sure as death, there was to come a point of time when the sum remitted to the trustee on account of each individual's work would be paid to that individual or his heirs[,]

id. at 230 (Fortas, J., dissenting), the Court still rejected the position that annuity contributions constituted "wages" within the meaning of the Bankruptcy Act. *Id.* at 226-29. The Court again noted that the contributions

did not "*satisfy the fundamental purpose of the . . . priority for wages due to workmen,*" *id.* at 228 (emphasis added), and that permitting priority status would reduce the amounts payable to workers. *Id.* at 228-29.

4. There is no principled basis for the Court not to follow its dictate in *Embassy Restaurant* in this case to "examine the nature of these [claims]." The IRS's claim, as the IRS concedes, is in the nature of a penalty. To afford a penalty claim priority treatment will subvert Congress's purpose in enacting the Bankruptcy Code to promote successful reorganizaiton of debtors, and will harm those parties for whose benefit Congress enacted Section 4971.

In the courts below, the IRS acknowledged that it relied on the label of excise taxes within the IRS covering § 4971, and that it cannot prevail if this Court's traditional definition of "taxes" continues to apply. *CF&I,* 148 B.R. at 338, pet. 48a-49a ("The IRS agreed that if the court employed such a test it would not be able to sustain the position that the section 4971 excise taxes are not penalties because it could not meet the third prong of the [*In re*] *Lorber Industries* [675 F.2d 1062, 1066 (9th Cir. 1982)] test," *i.e.*, that the exacation be "[f]or public purposes, including the purpose of defraying expenses of government or undertakings authorized by it").

While the IRS's concession negates any need for this Court to analyze the nature of the IRS's claims, even a cursory tax/penalty analysis demonstrates that the IRS's claims are penalties, and that recognition of such a priority would be wholly inconsistent with overriding bankruptcy reorganization objectives.

The Bankruptcy Court held that affording the IRS's claims priority treatment "would defeat any attempt by the Debtors to reorganize." *CF&I,* 148 B.R. at 339, pet. 51a. Such a result, of course, would directly contravene the fundamental policy of chapter 11 "to permit successful rehabilitation of debtors" and "to prevent a debtor

from going into liquidation, with an attendant loss of jobs and possible misuse of economic resources." *Bildisco*, 465 U.S. at 527, 528.

This result would not be isolated to CF&I. For example, in the LTV bankruptcy, the bankruptcy court remarked that the IRS's claim, if allowed as a priority claim, could preclude succesful reorganization, resulting in a "castastrophe for all involved." *Chateaugay Corp.*, 15 Empl. Ben. Cas. (BNA) at 1238. The USWA, with its extensive experience in bankruptcy reorganizations, believes that adoption of the IRS's position would threaten the potential for reorganization in numerous cases, with concomitant loss to all who depend on a successful chapter 11 process.

Applying this Court's longstanding tax/penalty distinction to the IRS's claims also gives effect to the core bankruptcy policies which mandate equality of treatment of similarly situated creditors, *see supra* pp. 10-11 and disfavor penalties, *see supra* p. 5.

The legislative history of Section 4971 demonstrates that Congress intended to punish employers who underfund their pension plans, but not to punish pensioners or the PBGC. *See, e.g., CF&I*, 148 B.R. at 338 n.9, pet. 47a (quoting legislative history); *Chateaugay Corp.*, 15 Empl. Ben. Cas. (BNA) at 1238. Providing priority treatment to the IRS's penalty claims, however, will "harm the parties that are intended to be protected by the pension plan that section 4971 seeks to enforce, because payment of section 4971 penalty claims would be at the expense of prepetition unsecured creditors including pensioners." *C&FI*, 148 B.R. at 339, pet. 51a; *Airlift Int'l*, 120 B.R. at 601-02. In enacting the Bankruptcy Code, Congress clearly did not modify *sub silentio* the traditional tax/penalty distinction, a modification which would harm the employees and retirees represented by the USWA and defeat the very purpose of chapter 11 of the Bankruptcy Code—reorganization.

CONCLUSION

For the reasons stated herein, the Court of Appeals' holding that the IRS's penalty claim is not entitled to a seventh priority should be affirmed.

Respectfully submitted,

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